

The Discourses on Post-National Governance and the Democratic Deficit Absent an EU Government

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The enduring joint decision trap in the absence of European government – Post-national constitutionalism – The dismissal of politics – Accountability of government before parliament at the core of representative democracy – Internalising the benefits and of externalising the disadvantages of staying together in the Union possible as long as political accountability is not ensured in the EU system – Breathing political life into the EU through constitutional practice without formal Treaty amendment – A time-frame for approval of treaty amendments – EP and the election of Commission president

INTRODUCTION

At the end of the 20th century, European legal scholars praised the new model of ‘post-national’ governance and constitutionalism, which they believed to be practiced in the EU, on the presumption that it would gradually prevail over the ‘hierarchical’ tradition of government typical of the member states. Attempts at constitutional comparison between the national and the European system concerning, say, separation of powers, or accountability, were left aside from the mainstream scholarly discourses.

The political debate on the EU democratic deficit, meanwhile, relied on the ‘domestic analogy’, namely on the assumption that the imbalance between the increasingly intensive exercise of political power and the low democratic legitimacy affecting the EU could be corrected by making the functions of the European Parliament (EP) similar to those of national representative assemblies.

My contribution intends to demonstrate that, although reflecting opposite approaches to the EU institutional system, both these discourses fail to capture the sense of the major events that have occurred in the past decade; namely the

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cycle of ‘constitutional change’ that took place from the 2001 Laeken Declaration to the 2009 Lisbon Treaty, the increasing popular rejection of the EU, and the Eurozone crisis. This failure, I submit, depends on neglect of mechanisms governing the member states–EU relationship that have gradually perverted the ‘output’ no less than the ‘input legitimacy’ of the EU, and which have put the whole project of the EU under severe pressure. Against this background, changes of these mechanisms are suggested here that seek to make use of insights of comparative constitutionalism outside of the traditional state’s realm.

THE PREMISES OF THE SCHOLARLY DEBATE

An important comparative account of the (then) EC’s decision-making procedure with that of the German federal system was given 24 years ago by Fritz Scharpf, on the ground that both these procedures make central government decisions dependent upon the agreement of constituent governments, and require such agreements to be unanimous or nearly unanimous.¹ Hence derives the ‘joint-decision trap’, which is responsible for the pathologies of substantive public policy affecting both systems, and the prognosis that

[i]n the absence of European government with a popular political base of its own, all possibilities of institutional transformation are entirely determined by the self-interests of national governments. And even those among them which most vigorously support activist and expansionary European policies are likely to hedge their bets when it comes to relinquishing their veto powers. Conversely, the ‘reluctant Europeans’ among member governments have been much more willing to accept disagreeable compromises on substantive policy than to weaken their own institutional control over the substance of future decisions.²

This has resulted in an increasing expansion of the EC’s jurisdiction, together with an ever closer control exercised by member states in the decision-making processes.³

It is worth noticing that this account differs from the *Bundesverfassungsgericht*’s definition of the EU member states as ‘Masters of the Treaties’. This view is driven by the quest for ultimate sovereignty, and aims to demonstrate the enduring nature of the EU as an international organisation, irrespective of the powers that

¹ F.W. Scharpf, ‘The Joint-Decision Trap: Lessons from German Federalism and European Integration’, 66 *Public Administration* (1988) at p. 254, although admitting, at p. 243–244, that ‘the European Community is much weaker in relation to its member governments than the German federal government is in relation to the Laender.’

² Scharpf, *supra* n. 1, at p. 268.

³ Scharpf, *supra* n. 1, quoting J.H. Weiler, ‘Community Member States and European Integration. Is the Law Relevant?’, 21 *Journal of Common Market Studies* (1982) p. 46–47.

it might acquire. The account given above, on the other hand, is focused on the interplay between the expansion of these powers and the role of member states within the European decision-making processes, namely on the EU's internal functioning.

Developments which have occurred since 1988 are likely to confirm Scharpf's assumption. In spite of the enormous changes that have affected the European system, it remains unchallenged that, absent a European government, institutional transformations are made dependent on the self-interests of national governments. Under the Lisbon Treaty, although legislative decisions no longer depend on the Council acting unanimously, but on the EP acting jointly with the Council that decides by a qualified majority unless the Treaties provide otherwise (Article 16 of the TEU), Article 48 TEU still provides, with limited exceptions, the requirement of unanimity among member states both for the approval and the ratification of the European treaties. Nor has a 'European government with a popular political base of its own' been born yet.

These are, in my view, the minimum 'hard data' of the European institutional system, the premises for whichever analysis of the substantial effects that the formal treaty provisions are likely to engender in terms of input as well as output legitimacy of the EU. My further assumption is that, for a number of reasons which I expose in the following pages, these premises have been largely underestimated in the scholarly debate.

THE POST-NATIONAL VERSION OF CONSTITUTIONALISM

Let us first consider the mainstream discourse on 'European post-national constitutionalism', or 'governance', that took place at the end of the 20th century. Under that label, I do not refer to the cosmopolitan approach in its various forms,⁴ nor a pluralist reading of constitutionalism.⁵ I rather refer to the thesis opposing the supposedly old state-centred constitutionalism to the new 'constitutional' processes emerging in the EU. While criticizing the 'legal positivistic' approach to EU law as providing too limited a set of intellectual tools or insights, this thesis was founded on 'the need for a critical perspective when applying apparently well-established concepts such as "constitution" or "democracy" to unfamiliar circumstances such as the newly emerging "post-national European polity"', and particularly on the notion that 'conventional "parliamentary" approaches to de-

⁴ See, e.g., J. Habermas, *Die postnationale konstellation. Politische Essays* (Frankfurt, Surkhampff Verlag 1998), and D. Held, *Democracy and the Global Order. From the Modern State to Cosmopolitan Governance* (Stanford, Stanford University Press 1995).

⁵ See, e.g., N. Walker, 'The Idea of Constitutional Pluralism', 65(3) *The Modern Law Review* (2002) p. 317 ff.

mocracy represent inappropriate attempts to offer legitimate anchorage to the activities of non-state entities such as the EU.⁶ To that end, the issue ‘of considering the relevance for the EU of the dialogic character of constitutionalism and constitutions as process, and as a framework within which differences and similarities between social groups are uncovered, negotiated and resolved’⁷ appeared essential. While relying on Tully’s re-definition of constitutionalism as ‘an intercultural dialogue between culturally diverse sovereign citizens’,⁸ it was assumed that, ‘in the post-national forum of the Union’, constitutionalism should be founded on a discursive process and on contestation between interests, rather than on the design of ‘good’ institutions for a European society.⁹

The discourse of ‘post-national European constitutionalism’, further developed and refined in a series of contributions,¹⁰ deserves attention firstly on methodological grounds. The positivistic pretention of exhausting, in legal terms, the approach to law does appear untenable to an overwhelming majority of contemporary legal scholars, irrespective of whether it concerns the EU or other organizations, with the inherent need for an interdisciplinary approach. However, in the post-national discourse such an approach seems to imply a shifting from ‘traditional’ issues of constitutionalism, departing from parliamentary representation, towards the ‘new’ perspectives of the ‘intercultural dialogue’ or of the ‘discursive process’. But this is not necessarily the case. Scharpf’s aforementioned essay on the unanimity rule within the EU suffices to demonstrate that non-legal scholars not only might be perfectly equipped for, but are likely to provide thorough contributions to, ‘traditional’ issues of constitutionalism.

The post-national discourse praises such a shift because it relies on the post-modernist presumption that whichever institution is involved with ‘stateness’ is a relic of the past, whereas the new informal social relationships that are believed to characterize the European polity reflect per se the dawn of the future. In this perspective the settled rules and devices referred to as ‘traditional’ constitutionalism appear to be merely formalistic constructions vis-à-vis the informal and therefore reversible relationships and processes that characterize our time. And the EU,

⁶J. Shaw, ‘Postnational Constitutionalism in the European Union’, 6(4) *Journal of European Public Policy* (1999) p. 580-581.

⁷Shaw, *supra* n. 6, at p. 586.

⁸J. Tully, *Strange Multiplicity. Constitutionalism in an Age of Diversity* (Cambridge University Press 1995) p. 131, criticizing ‘simplistic concepts of popular sovereignty and constitutional association as premises for constitutional dialogue.’

⁹Shaw, *supra* n. 6, at p. 596.

¹⁰See *inter alia* U. Haltern, ‘Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination’, 9(1) *European Law Journal* (2003), 14 ff., and V. Breda, ‘A European Constitution in a Multinational Europe or a Multinational Constitution for Europe?’, 12(3) *European Law Journal* (2006) p. 330 ff.

as a never-ending project, is believed to reflect this far better than the old European states.

Scholars launching the post-national discourse do not simply aim, therefore, at integrating the study of governmental institutions with that of new forms of citizens' participation in public policies, or of dialogic forums. Nor do they content themselves with answering the question of whether constitutions are conceivable outside of the dimension of the state. Their openly asserted ambition consists rather in a whole re-foundation of the very paradigms of constitutionalism.

But the idea that these consist in a fixed set of rules perpetuating the state's sovereignty collapsed with the rise of totalitarian regimes, being at odds with the democratic constitutionalism which we are used to dealing with, namely an enterprise aimed at challenging uncertainty through continuous adjustments of diverse institutions and balancing of competing principles, including those of democracy and pluralism.¹¹ In that version, constitutionalism is an open textured concept, just as post-nationalism is. However, it is less confused than the latter, also because it relies on practices that have been experimented, and successfully experimented, for a long while.

On the other hand, unlike the post-national discourse's presumption, the most significant differences between the national and the European context are not to be found in changes that affect society and the related challenges to the re-definition of the democratic space. In both contexts we assist in constant negotiations and contestations of interests, in the rise of independent authorities in the marketplace, and in the diffusion of dialogic and participative forms of democracy. Even Weiler's formula of the 'multiple demoi', depicting the European context two decades ago, is more and more likely to refer to the national contexts as well, given their increasingly multicultural composition. The most significant difference between these consists instead, as will be explained presently, in how power is distributed among political institutions.

The post-national approach goes exactly in the opposite direction. But what is most important is that it has significantly influenced the self-representation of the EU institutions, and even some of their attempts of institutional engineering. The 2000 Lisbon Strategy, that was launched with the objectives of making Europe 'the most competitive and dynamic knowledge-based economy in the world', and of reaching full employment in the whole area by 2010, was supported from an ambitious design of governance, the 'Open Method of Coordination', that relied on processes rather than on formal acts, on soft law rather than on hard law, and on coordination, peer review, networks and heterarchy rather than on centralised

¹¹ On this see C. Pinelli, 'The Combination of Positive with Negative Constitutionalism in Europe. The Quest of a "Just Distance" between Citizens and the Public Power', 13(1) *European Journal of Law Reform* (2011) p. 31 ff.

hierarchical tools of compliance. But it also appeared clear that, contrary to the Maastricht constraints, the bulk of the whole design depended on the member states discretionary power in engaging in internal structural reforms of the welfare sectors.¹² The Strategy's subsequent failure revealed definitively that, while paying lip-service to the OMC, national governments were not prepared to engage in any reform that, in shifting financial resources from traditional social policies to investments in technology, would endanger the electoral approval of their own constituencies.

The Commission's 2001 White Paper on European governance echoed to an even greater extent post-national concepts, with the intention of melting together the old communitarian method and a pluralist political arrangement in which the decision-making powers of national governments are decentralised and displaced by a plethora of multi-level organisations, NGOs, civil society institutions, and public and private interests.¹³ But the 'governance turn', it has been objected, goes to the point of acting 'as an 'anti-politic machine' in which accountability becomes progressively blurred, decision-making increasingly remote and obtuse, and the citizens of Europe – in whose name the EU claims to speak – ever-more voiceless.'¹⁴ Further criticism has been raised on the ground that, given the scarce efficacy of formal mechanisms, the interests that EU governance claims to represent risk 'magnifying the disadvantages of pork barrel, pressure group politics often associated with conventional democracy, without the benefits of its compensating advantages of promoting political equality and responsiveness.'¹⁵ The risk has been prospected 'that governance may obscure and dissipate traditional normativity (the rule of law, democratic input) without adequately substituting for it.'¹⁶

It is one thing to support more open and more genuinely deliberative forums for participation by citizens beyond those of representative democracy, it is quite another to support an oversimplified opposition 'pushing a "governance" approach at the expense of one honed towards a traditional notion of "government", or deliberative democracy at the expense of representative democracy.'¹⁷ This is precisely the opposition that the 2001 White Paper presupposes, and fully corresponds with the claim of the Commission's Green Paper that globalisation heralds the end

¹² See recently R. Colliat, 'A Critical Genealogy of European Macroeconomic Governance', 18(1) *European Law Journal* (2012) at p. 18.

¹³ European Commission, *European Governance: A White Paper*, COM(2001)428.

¹⁴ C. Shore, 'European Governance or Governmentality? The European Commission and the Future of Democratic Government', 17(3) *European Law Journal* (2011) at p. 303.

¹⁵ R. Bellamy and D. Castiglione, 'Democracy by Delegation? Who Represents Whom and How in European Governance', 46(1) *Government and Opposition* (2011) at p. 125.

¹⁶ G. Conway, 'Recovering a Separation of Powers in the European Union', 17(3) *European Law Journal* (2011) at p. 306.

¹⁷ D. Curtin, 'Tailoring Legitimacy to the Shape of the EU', 1 *EuConst* (2005) at p. 426.

of representative democracy as we know it.¹⁸ The paradox of such an approach is that it seeks to get closer to citizens, in the awareness of the increasing sense of remoteness of European policies;¹⁹ as if this objective could be reached by reverting to the elitist paradigms of post-modernism.

EUROPEAN CONSTITUTIONALISM AS FOUNDED ON THE DOMESTIC ANALOGY

An understanding of the Commission's discourse should also take the political scenario of that period into account. The White Paper was published when the issue of the 'European Constitution' was at the top of the agenda. In his January 1999 speech at the European Parliament, German Foreign Minister Joschka Fischer called for a broader debate on the issue, with the effect of persuading influential political leaders that it was time to use the word 'constitution', which had been rigorously banned from the European official lexicon because of the controversies that it was expected to provoke. And the December 2001 Laeken Conference ended with a Declaration that paved the way to the 2004 Constitutional Treaty.

New solutions were then foreseeable for the infamous EU democratic deficit, including those aimed at ensuring the Commission's accountability before the EP, and therefore at affirming a political legitimacy of its very functioning in terms of government. In this perspective, the White Paper's insistence on governance, and on non-representative forms of democracy, might appear a way of finding an alternative basis for the Commission's legitimacy that would at the same time reaffirm its historical role as the guardian of the European interest. The choice of replacing 'government' with 'governance' was not only, then, a question of culture. It involved the Commission's destiny.

I do not need to enter into the details of the democratic deficit issue here, nor to enumerate the solutions that the Lisbon Treaty provides in this respect both in the Chapter on European Democracy and in the TFEU provisions devoted to the EU institutions. I need only to stress that the discourses concerning that issue tend to follow a direction opposite to those taken about European governance. While the latter were founded on the premise that the EU was such a unique political construction to defy any comparison with that of the national state, including the respective institutional frameworks, remedies to the mismatch between the powers exercised by the EU and the presence of democratic controls were frequently viewed in terms of a strict comparison with national systems, to the point of presuming a sort of domestic analogy.

¹⁸T. Burns et al., *The Future of Parliamentary Democracy: Transition and Challenge in European Governance*, Green Paper prepared for the Conference of the European Union, AS/D (2000) (European Commission 2000), <http://ec.europa.eu/governance/docs/docs_en.pdf>.

¹⁹European Commission, *supra* n. 13, at p. 35.

However, the significant transformations of the EP's role, from the original assembly of national parliamentarians to an institution that has gradually acquired the functions exerted by national parliaments, do not appear per se adequate in redressing the democratic deficit. On the other hand, unlike the domestic analogy's presumption, control of government appears to date more significant than legislation among the parliamentary functions even at the national level,²⁰ as a consequence of 'the shift of the point of political gravity from legislation to execution or administration.'²¹ It is therefore accountability of government before parliament that lies at the core of representative democracy. It remains to be seen why it is unanimously held to be lacking in the EU.

LAYING THE BLAME ON 'BRUSSELS'

To this end, we have to return to the 'joint decision trap' thesis, according to which the EU system's institutional transformations are made dependent on the self-interests of national governments. These are given the opportunity both of internalising the benefits and of externalising the disadvantages of staying together in the Union. While the burden of hard choices, such as the Maastricht constraints, is discharged on the EU, EU long-term policies requiring recognisable initiatives from member states are blurred to the extent that they might engender electoral costs, as the practice following the Lisbon Strategy suffices to demonstrate. These opportunities are available for national governments provided that in the EU system political accountability is not ensured. It is in their own interest to maintain the dispersion of governmental authorities and the opaqueness of the procedures behind the blue sky and stars of the EU's symbol, and to let people believe the mediatic tale of Brussels as the seat of inaccessible technocracy. Hence derives inter alia what has been called 'the Commission's accountability paradox', namely the fact that 'by and large the Commission is highly accountable towards the other EU institutions, while 'outward' accountability has remained rather underdeveloped', with the consequence that "Brussels bureaucrats", invisible as they are to the public gaze, still *appear* to be unaccountable.'²²

Although clearly artificial, the divide between national politics and supranational technocratic governance following this mechanism has thus permeated the popular imagination, hiding the dilemma between the adoption of long-term

²⁰ A.W. Bradley and C. Pinelli, 'Parliamentarism', in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) at p. 665.

²¹ See B. Crumm, 'Tailoring Representative Democracy to the European Union: Does the European Constitution Reduce the Democratic Deficit?', 11(4) *European Law Journal* (2005) at p. 456.

²² A. Wille, 'The European Commission's Accountability Paradox', in M. Bovens et al., (eds.), *The Real World of EU Accountability. What Deficit?* (Oxford University Press 2010) at p. 85.

policies, that require time to be understood by citizens and are not without risks in terms of electoral approval, and the mere administration of the present, with the related dismissal of politics. While regularly preferring the latter, the national governments' condition is to lay the blame of the European malaise on the 'obscure and unelected' officials of Brussels.

Nonetheless, the dismissal of politics is paving the way for the rise of populist parties in national parliaments no less than in the EP. Hence the question arises of how long the whole game is likely to endure.

THE FAILURE TO MANAGE THE EUROZONE CRISIS

In the meanwhile, the Eurozone crisis has dissolved the narrative of the EU as a well-functioning technocratic organization, which should thus have provided it output legitimacy.

Even before the opening of the Greek chapter, the decision-making procedure failed to deal with the financial aggression to the euro. While the Commission behaved as a shadow institution, deep conflicts arose both among member states and the European Council, and among national governments and central banks. The consequent delays of EU interventions, with the exception of the European Central Bank (ECB), demonstrate its low capacity in facing the challenges arising from the management of markets. And, first and foremost, the vetoes of important member states on the adoption of European financial measures such as the Eurobonds confirm their unwillingness to shape a common future.

According to some commentators, the EU's leading policymakers

know very well how to keep the show going and plug the dangerous holes that might cause incalculable damage to the Euro area. What they just do not know, however, is how to make the kind of leap forwards which is required to put an end to the ever-recurring crises: the move towards a political union in which the inevitable trade-offs between national sovereignty and economic, fiscal and monetary integration are clearly recognised, shared with an enlightened electorate, and finally accepted by them through strengthened democratic procedures.²³

CONSTITUTIONAL PRACTICE CONNECTING CITIZENS TO EUROPEAN POLITICS

The fact that politics appears to be squeezed between financial markets and the electorate depends to a significant extent on how the EU institutional mechanisms

²³O. Cramme, 'Europe after the Doomsayers', *Policy Network*, 10 Feb. 2012, <www.policy-network.net/pno_detail.aspx?ID=4135>, last visited on 1 July 2013.

are shaped. These need therefore to be changed on the ground of efficiency just as much as that of democracy. Once again, a difficulty arises here from the joint-decision trap. Mutual adjustments between institutions, including inter-institutional agreements, and subsequent reforms of the European treaties, have historically tended to maintain the 'institutional balance' between intergovernmental and supranational elements of the system, and the Lisbon Treaty makes no exception in this respect. How might, then, member states accept changes different from those serving their self-interests?

Something different, however, is at stake today: the risk of the EU sinking is widely deemed as less remote than ever, with incalculable consequences for the very stability of national democratic systems. On the other hand, rather than the action of national governments in the decision-making process, remedies should aim at limiting the dispersion of European government, that endangers the performance of the whole of the EU and, at the same time, impedes the visibility of its rulers.

Furthermore, these remedies do not necessarily depend on a formal revision of the EU treaties. The opaqueness of European rulers and rules derives to a significant extent from how these are presented at the national level. Mediatic agencies and political parties co-operate decisively with national governments in insulating the EU from the imagination of politics. And this result, in turn, is ensured from practices that affect the points of connection of the citizens with the European institutions.

An example is provided by the ratification of the European treaties, whenever the Constitution of a member state requires a referendum to that end. Article 48 TUE provides for the unanimous ratification by the member states, but of course leaves them the opportunity to decide when it might take place. In practice, European treaties may be ratified at a distance of one or even two years, with the effect of exacerbating the national dimension of the referendum when required. Wasn't the 2005 rejection of the Constitutional Treaty in France clearly due to the race for the national Presidency? This practice could easily be changed. The most representative European political parties might agree that the EU treaties should be ratified by each member state within a very short period, e.g., a week, thus deeply enhancing the supranational sense of such an operation.

A far more important example is provided by the designation of the European Commission's President, who under the Lisbon Treaty is appointed by the European Council 'taking account' of the result of the EP's elections, and then elected by the EP. Finally, the Treaty asserts that the whole Commission is collectively responsible before the EP. The relationship between the EP and the Commission appears thus to be similar to the confidence that characterizes the parliamentary system, with the difference that the appointing power of the Commission rests

with the European Council, whose structural and functional features are radically different from those affecting the head of state in a parliamentary regime. The latter's powers of appointing the prime minister and of dissolving parliament are exercised only as a formal matter, unless a government crisis occurs whose solution appears uncertain. But in this case the role of the head of state is essentially arbitral rather than political, being driven by the aim of restoring a parliamentary majority. The European Council's role in appointing the Commission's President, to the contrary, is highly political, and exerted by a huge board gathering together the highest ranks of the executive of the member states.

It is true that in October 2004 the EP proved to take its function of merely 'approving' the Commission seriously – a function it which was entrusted with before the Lisbon Treaty's enactment – thus expressing 'beginnings of Union authority.'²⁴ The 'Barroso drama' does confirm the commonly held assumption that written constitutional provisions create only a general framework for the development of conventional relationships among governmental institutions. These relationships, together with parliamentary regulations, electoral laws, and the structure of the political system, play a major role in shaping the parliamentary model everywhere.

The question remains open, however, whether the 2004 record might suffice to ensure that the new Commission's investiture procedure will correspond to that of a government in a parliamentary regime. In particular, the provision that, while designating the President's Commission, the European Council shall 'take account' of the result of the EP's elections leaves room for discretion, to the extent that these elections remain politically 'de-structured', namely reduced to the choice from a certain list of candidates of the electors.

As in the case of treaty ratification by national referendum, that circumstance depends exclusively on the prevalence of national over European party politics considerations; the EU treaties do not, nor could they, forbid an informal designation by political parties of the candidate for the position of the European Commission's President on the occasion of the EP's elections. It is worth adding that the presentation of a candidature from one of the major European political families would suffice to convince other parties to do the same. At that point, the EP's elections would be politically 'structured', with the following consequences for the EU-member states relationship.

First, the electorate would be provided with a supplementary political choice, that makes the difference between a shallow election of national representatives at the EP and a telling competition for the parliamentary majority and therefore for the EU government's leadership. Furthermore, the European Council's appointing

²⁴W.T. Eijbsbouts, 'The Barroso Drama: Reality for the EU Constitution', 1 *EuConst* (2005) at p. 154.

power of the Commission's President while 'taking account' of the result of the EP's elections would correspondingly be converted into that of designating the candidate of the European political party that won the elections on a specific political platform. Finally, the political legitimacy of the Commission would be significantly strengthened, creating the premises for bridging the gap mentioned earlier between its 'inward' and 'outward' accountability.

Given the complexity of contemporary polities, accountability is a multifaceted concept everywhere, requiring detailed analysis in various respects.²⁵ Nonetheless, the peculiar dispersion of governmental authorities affecting the EU creates unique opportunities for exerting political power without being held accountable, with the correspondent need for identifying as far as possible an institution called to account on political grounds. To that extent, rather than being based on a domestic analogy, this need should be connected to the issue of how constitutionalism might be conceived outside the old state setting.²⁶

It has been objected that 'given the heterogeneity of the EU, it would be least desirable if it turned into a majoritarian system in which the Commission could govern the EU while enjoying a stable majority in the Council and/or in the European Parliament.'²⁷ However, unlike the current distorted EU-member states relationship, the conflicts that a stable political majority in the EP might engender with the intergovernmental institutions would be of a political kind. On the other hand, the former would enhance, rather than endanger, the role of counter-majoritarian authorities, starting with the European Court of Justice (ECJ). Conflicts might arise here as well, reflecting the emergence of a constitutional democracy in the European space.



²⁵ M. Bovens et al., 'The Real World of EU Accountability: Comparisons and Conclusions', in Bovens et al., ed., *The Real World of EU Accountability* (OUP 2010) p. 174 ff.

²⁶ For an important account see N. Walker, 'Beyond the Holistic Constitution?', in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (OUP 2010) p. 291 ff.

²⁷ Crum, *supra* n. 21, at p. 464.